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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1965

J. C. WADE, PETITIONER

versus

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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Attorney for Petitioner

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner above named respectfully prays that this Court grant rehearing of its order of October 11, 1965, denying his petition for writ of certiorari, and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case, reported below at 344 F. 2d. 1016, as prayed for in the petition filed

July 8, 1965, and in support of this petition for rehearing represents to the Court as follows:

(1) Since the filing of Petitioner's petition for writ of certiorari, a decision has been handed down by the United States Court of Appeals for the Ninth Circuit that conflicts with the decision of Petitioner's case by the United States Court of Appeals for the Fifth Circuit, 344 F. 2d 1016. In *Bowie v. United States* 345 F. 2d 605 (1965), the Ninth Circuit Court of Appeals held that evidence of distinct offenses of defendant unconnected with that charged in the indictment is not only inadmissible, but so prejudical in nature as to constitute plain and fundamental error. (A copy of the opinion of the Court of Appeals for the Ninth Circuit is appended hereto.)

Petitioner respectfully suggests that the circumstances cited as fundamental error in the *Bowie* case were not so compellingly prejudicial as those in his own trial. In the *Bowie* case, the Court, before the jury, referred to a situation in evidence wherein a conversation had occurred " . . . When the defendant Bowie was under arrest . . .", and was held to have committed plain error by that general reference to the defendant's possible guilt of an unspecified crime; in the case at bar, the prosecutor for the Government did no less than "accuse by interrogation" the Petitioner, J. C. Wade, of an act that 99 of every 100 adult persons in the United States know to be a serious crime: the failure to file income tax returns.

(2) The Petitioner further respectfully contends that the Supreme Court, upon re-examination of those portions of the opinion of the Fifth Circuit Court of Appeals as are addressed to the argument of Petitioner clarified and restated in this Petition for Rehearing, should grant rehearing of Petitioner's cause. *Hickman v. Taylor* 327 U.S. 808, 328 U.S.

876, 329 U.S. 495; *Brinkerhoff-Faris Trust Co. v. Hill,* 280 U.S. 604, 550, 281 U.S. 673.

In affirming Petitioner's cause, the United States Court of Appeals for the Fifth Circuit stated the following ruling as to the questions Petitioner contends the Trial Court so prejudicially allowed the Prosecutor to ask:

> "We agree that they (the questions propounded Petitioner by the prosecutor) were not admissible to show intent, but we think they were proper preliminary questions to a further inquiry, had they been answered in the affirmative, which would have tested the truth of the testimony of the defendant that he had acted in good faith and were admissible as primary evidence." 344 F. 2d 1016, at 1017.

The Petitioner respectfully contends that this ruling is fundamentally antithetical to the right of all defendants to fair trial: that the logical extension of this reasoning would wreak prejudicial embarrassment upon any defendant guilty of a crime entirely extraneous to the crime for which he was on trial: it would require that, to be free from the effects of prejudicial interrogation, a defendant be innocent of all other crimes than that at issue on his trial. In order to function properly, our system of justice must be based on fairness, and not upon inquisitional crusades toward ultimate innocence.

The Petitioner therefore respectfully seeks re-hearing of his petition for writ of Certiorari, so that the Supreme Court may consider whether Petitioner was "tried upon competent evidence, and only for the offense charged." *Boyd v. United States,* 142 S.Ct. 450, 12 S.Ct. 292, 35 L. Ed. 1077.

Wherefore, it is respectfully submitted that this petition for rehearing should be granted.

Respectfully submitted by

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238 East Forsyth Street
Jacksonville, Florida 32202

Attorney for Petitioner

Please note extract from a recent case following this petition. I did not have time to better arrange.

Respectfully,

Wardell BOWIE, Appellant,
v.
UNITED STATES of America,
Appellee.
No. 19271.

United States Court of Appeals
Ninth Circuit.

May 12, 1965.

Defendant was convicted of certain narcotic offenses. The United States District Court for the Southern District of

California, Central Division, William D. Murray, J., entered judgment, and the defendant appealed. The Court of Appeals, Jertberg, Circuit Judge, held that where narcotics agent testified that defendant had made statement to agent concerning a different narcotics offense, and District Court during government's closing argument to jury struck agent's testimony and instructed jury to disregard testimony because statement was made while defendant was "under arrest," an alleged fact of which jury had not previously been informed, but District Court did not instruct jury to disregard reference to arrest, there was plain error, which would be noticed by Court of Appeals, though defendant had not moved for mistrial, and judgment of conviction would be reversed.

Reversed and remanded for new trial.

See also 9 Cir., 318 F.2d 693.

1. Criminal Law 656(3), 1044

Where narcotics agent testified that defendant had made statement concerning a different narcotics offense, and federal District Court struck testimony and instructed jury to disregard testimony because statement was made while defendant was "under arrest," an alleged fact of which jury had not previously been informed, but did not instruct jury to disregard reference to arrest, there was plain error, which would be noticed by Court of Appeals, though defendant had not moved for mistrial, and judgment of conviction would be reversed. Narcotic Drugs Import and Export Act, § 2(c, f), 21 U.S.C.A. § 174; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

2. Criminal Law 369(1)

Subject to well-defined exceptions, when defendant is on trial for specific offense, evidence of distinct offense unconnected with that charged in indictment is not admissible.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

ZACH H. DOUGLAS
Attorney for Petitioner.

CERTIFICATE OF SERVICE

, I do certify that three copies of the foregoing Petition for Rehearing have been furnished, by mail, to Hon. Thurgood Marshall, Solicitor General, Dept. of Justice Building, Washington 25, D.C. this 3rd day of November, 1965.

ZACH H. DOUGLAS
Attorney for Petitioner